STRAITS SETTLEMENTS REPORTS.

TEH LEONG CHEH v. REX.

[App. Crim. Juris. (McElwaine, C.J.) September 15, 1941]

Appeal—Conviction under Section 304A of the Penal Code—Evidence indicating that accused lost his head in an emergency—Point not raised by the Defence—Conviction for driving in a manner dangerous to the public under Section 10, Traction Engines and Motor Cars Ordinance substituted by Appellate Court—Observations on the production of photographs and sketch plans.

The appellant in this case was convicted under Section 304A of the Penal Code for causing the death of one Ah Sin by a negligent act not amounting to culpable homicide, to wit, by driving a motor car, in a manner so negligent as to collide with a rickshaw, of which the accused was the puller. The District Judge found that the appellant had shown a wicked disregard of his duties as a driver and that he was guilty of the high degree of negligence required for a conviction under Section 304A of the Penal Code.

Held, (1) that the evidence showed that the appellant lost his head in the emergency in which he found himself, through his careless lookout, and that there was a doubt as to whether he was reckless or just careless;

(2) that it did not matter that this defence was not raised and that it must be considered if it could reasonably be supported by the evidence; and

(3) that therefore the conviction under Section 304A of the Penal Code must be set aside and a conviction under Section 10 of the Traction Engines and Motor Cars Ordinance for driving in a manner dangerous to the public be substituted for it.

The Appeal Court also made observations on the giving of expert evidence showing that the driver was sober though he had taken alcohol shortly before the accident and on the production and use of photographs and sketch plans of the scene of the accident.

Cases referred to :—

(1) *Beamon v. Ellice* 4 C. & F. 585.

(2) *R. v. Mitchell* 6 Cox C.C. 82.

(3) *United States Shipping Board v. Ship St. Albans* (1931) A.C. 632.

(4) *Hindson v. Ashby* (1896) 2 Ch. 27.

(5) *R. v. Bateman* 19 Cr. App. R. 8.

(6) *Cheow Keok v. P. P.* (1939) F.M.S.L.R. 90; (1940) 9 M.L.J. 103.

(7) *Andrews v. Director of Public Prosecutions* (1937) A.C. 584.

(8) *R. v. Hopper* (1915) 2 K.B. 435.

(9) *Knowles v. The King* (1930) A.C. 366.

(10) *R. v. Ong Choon* (1938) S.S.L.R. 248; (1938) M.L.J. 227.

MAGISTRATE'S APPEAL.

D. K. Walters for the appellant.

C. H. Butterfield for the respondent.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

McElwaine, C.J. :—The appellant was convicted on the following charge :—

> That he, on or about the 22nd day of May, 1941, at North Bridge Road, did cause the death of one Ah Sin by a negligent act not amounting to culpable homicide, to wit, by driving motor car SN. 890 in a manner so negligent as to collide with rickshaw S.M.C. 1437, and thereby committed an offence punishable under section 304A Penal Code.

He was sentenced to six months simple imprisonment and his licence was suspended for two years.

Several points were raised on the appeal but it is only necessary to notice some of them.

The first was that the prosecution prejudiced the case by calling a doctor who examined the appellant within an hour of the accident and deposed that although he smelt of alcohol he was not drunk but was perfectly normal, and by calling a chemist who examined a specimen of the appellant's blood taken by the doctor and who found that it contained a certain concentration of alcohol. One paragraph of the Chemist's report said: "Published statistical records show that out of a number of persons examined in whose blood the above concentration of alcohol has been found about one-third showed slight signs of intoxication at the time when the sample was taken." Now there was no evidence that when this report was prepared the chemist knew that the medical evidence was to the effect that the appellant was not drunk. He prepared a report giving his expert scientific opinion on a sample of blood. He was not to know whether his report was to corroborate or to contradict other witnesses, or to be in itself decisive. In fact it tended to corroborate the doctor as it shows that the chances of the accused being even slightly intoxicated were two to one against.

The effect of this evidence was to establish a very important point in the accused's favour, namely that he was sober, and the clearing up of this point did not prejudice the accused.

I think it may very well be that the fact that a driver of a motor car had taken alcohol shortly before an accident has some bearing on the quality of his driving even though he be perfectly sober. Even a small amount of alcohol may have some effect on a driver's reaction and on his power of synchronisation, and whether that effect is to improve or to impair the quality of the driving may depend on the idiosyncrasies of the individual. That is a matter for further expert evidence and in this case there was no such further evidence.

The only evidence on this head was that the appellant was sober and normal and there is nothing in the learned Magistrate's judgment to suggest that he thought otherwise.

It is not usually prejudicial to a motor car driver to prove that he was sober and normal. This evidence did not prejudice the appellant.

The second point was that certain photographs taken of the bridge, rickshaw and motor car should not have been put in evidence.

The principal objection to these was that they did not represent the scene at the time of the accident, as the photograph showed white lines painted on the road which were not there when the accident happened. Those white marks were painted over marks which the police found on the ground and which both they and the appellant thought were marks made by the brakes of the appellant's car being applied. The marks were painted so that they would shew up in the photograph.

Mr. Walters relied on *Beamon v. Ellice*[1] in which objection was successfully taken to the putting in of a plan professing to show the way in which a carriage and cart came into collision. The report does not suggest that the cart and carriage were in the position they were shown to occupy on the plan at the time the plan was made. The plan appears to have been made with a view to illustrating a theory or of supporting evidence which it was expected would be given.

This is a very different case from the present, as is also *R. v. Mitchell*[2].

In *United States Shipping Board v. Ship St. Albans*[3] everything depended on the position from which photographs of two ships just before they collided were taken. The point in issue was the exact spot where the collision occurred. The learned Chief Justice who tried the case considered the photographs in the light of conflicting evidence given by witnesses as to the inferences to be drawn from them, and he found himself unable to form a trustworthy judgment upon their contents and bound to deal with the case on the evidence of eye-witnesses. He, in effect, rejected the photographs and the Judicial Committee upheld him.

That too is a very different case.

In *Hindson v. Ashby*[4] A. L. Smith L.J. considered that he could not infer from a photograph taken in 1895 of an area of land what its condition was the year before. Photographs like those in the present case have for years been exhibited in the Courts of this country without objection and I think they are most helpful.

It is true that a photograph should represent the place as it existed at the moment of the accident, but I do not consider that a photograph of the scene of a street accident is inadmissible just because it shews shop windows open which were closed at the time of the accident if nothing turns on this circumstance, or because pedestrians and vehicles are shown which were not there when the accident happened and which appear in the photograph because they happen to be using the highway at the time the photograph was taken. Of course, it would be made plain to the Court that these fortuitous circumstances have no bearing on the case. The white paint is only a new circumstance in the sense that the paint was not there immediately after the accident. But the marks were, and the paint superimposed on the marks only shows up the position of the marks.

The marks merely show the direction and course in which the car was travelling. The photos could not be used for such purposes as estimating the distance of the car at the time it started to turn from what has been called the pillion in the centre of the roadway at the beginning of the bridge, nor could they be used for any other purpose of measurement.

Since the point has been raised, I may say that the only possible objection I can see to the practice of painting marks on roads for photographic purposes is, that if there is a dispute as to what caused the marks any peculiar features of the marks by which they could be identified might be eliminated. For instance, the marks might show the tread of the tyre. There might be a dispute as to whether this tread corresponded to tread of a particular tyre; so it is desirable that

any person having an interest in saying whether or not the mark was made by a particular tyre should have an opportunity of examining it before it is defaced with paint. The paint does not make evidence but it may destroy evidence, and so long as the Magistrate knows that the paint was put there for photographic purposes I cannot see anything to invalidate the use of the photographs for such limited purposes as showing the course of the car and the relative positions of the vehicles when the photograph was taken, provided those positions have not been altered since the accident happened. Whether there were marks on the road and the inference to be drawn from them is entirely a question of evidence to be proved by oral testimony.

In this case the identity of the tyre marks represented by the white lines in the photograph is not disputed. There is nothing in this objection.

Another objection taken by Mr. Walters is that the key to a plan made by Sergeant Sardara Singh should not have been put in evidence. This key gave measurements of the brake marks. Unfortunately these measurements were not given by him in his evidence, nor did he swear that the measurements set out in the key were correct. This objection is very technical but it is a valid objection.

I turn now to the serious point of substance in the case. The Courts in the Colony have, I believe, always held that the negligence referred to in section 304A of the Penal Code is the negligence of that degree of recklessness which proves *mens rea*. As Lord Hewart put it in *R. v. Bateman*[5], "the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment". I need only refer to *Cheow Keok v. P. P.*[6].

The accused was driving his car along North Bridge Road towards Elgin Bridge. Shortly after passing High Street he overtook a car S.4569 driving in the same direction. S.4569 was travelling at about 20 to 25 miles per hour. The evidence of the driver of this car is not very precise as to when it was the appellant passed him, but it was shortly after passing the High Street intersection with North Bridge Road. Although the track marks cannot be used as evidence of speed, since their length was not proved, there was ample other evidence to indicate that the car was being driven at a fast rate and in excess of 30 miles per hour —how much in excess of that speed it is impossible to say, but having regard to the fact that although the car (a Hillman Minor) had the brakes on for some time before the collision yet it struck the rickshaw with such force that the deceased was thrown across the footpath, over the parapet on the far side of the footpath and into the river, I think it was reasonable for the Magistrate to find that the car was travelling at a speed very much greater than 30 miles per hour. But speed is by no means a decisive factor, especially after mid-night when busy traffic is not to be expected. The learned Magistrate referred to the fact that the traffic was probably not appreciable. "It is perfectly possible that a man may drive at a speed or in a manner dangerous to the public and cause death and yet not be guilty of manslaughter" said Lord Atkin in *Andrews v. Director of Public Prosecutions*[7].

There was ample evidence on which the Magistrate could find the following facts :—

1. The appellant was driving at a speed very much in excess of 30 miles per hour along the centre of North Bridge Road.
2. He was well acquainted with the road and bridge.
3. He would have to swerve to avoid striking the central structure of the bridge which followed the line of the centre of the road.
4. The appellant swerved more sharply or more quickly than was otherwise necessary because he saw a rickshaw crossing his course at the middle of the road.
5. He entered the left hand roadway of the bridge, crashed into the rickshaw deceased was drawing, mounted the footpath and came to rest against a concrete pillar supporting the superstructure of the bridge.
6. That he did not see the rickshaw with which he collided until after the accident.
7. That he had applied his brakes before entering on to the bridge.
8. That he was sober and normal.
9. That the street lighting was good.

The learned Magistrate seemed dubious about this second rickshaw but I think its existence should be held to be established although the taxi driver did not notice it. The Magistrate thought that even if the second rickshaw did exist, it was not a matter of great importance, as the appellant would have had to swerve in the manner he did, rickshaw or no rickshaw, to avoid crashing into the central structure of the bridge.

With all respect to the very experienced Magistrate I attach more importance to this second rickshaw than

he did. It is natural that the appellant should swerve more quickly or violently to avoid an object moving across his path than to avoid a stationary object a little further ahead. This second rickshaw has a bearing on two other questions—did its sudden appearance cause the appellant to lose his head? Was he careless in not seeing it before it reached the centre of the road?

There is no evidence whether appellant's car had its head lights on or not. The witness Wee Kim Hock saw the back of the rickshaw before the collision; it had small lights.

The Magistrate directed himself correctly on the law and found that the facts justified the inference that the appellant was criminally negligent. He says "It seems clearly to show a wicked disregard of one's duties as a driver to proceed at a speed so excessive, or with a combination of speed and lack of look-out so gross, that to swerve and crash into a pillar of the bridge at the side of the road (the Magistrate might have said 'on the footpath') is the alternative to colliding violently with a prominent fixed object like the central structure of Elgin Bridge."

Now there is one aspect of this case which has caused me a great deal of trouble; it was not touched on by the Magistrate and does not appear to have been raised by counsel whose main preoccupation appears to have been to show that the corpse taken out of the river was not proved to be the corpse of the man who was pulling the rickshaw at the time of the accident. The aspect to which I refer is, was the accident due not to recklessness but to the appellant, to use a colloquialism, losing his head? That he was careless there is no doubt. He was driving fast and and had he been keeping a proper look-out he should have seen the crossing rickshaw before it got to a position which forced him to swerve violently to avoid it.

The appellant says that when he saw this rickshaw "I was shocked. I swerved left. I hit another rickshaw and one of the pillars of the bridge. If I had not swerved my car was on a straight line with the centre division of Elgin Bridge. Had I seen no rickshaw I would have swerved gently to the left. I would have had enough room to do that. I intended to swerve gently to the left. I saw the rickshaw just before taking the swerve. I did not take a gentle swerve because I was shocked. I then lost control of my steering. I did apply my brakes. I did not see the rickshaw I hit before I hit it".

These words "I was shocked. I lost control of my steering" are some indication that the appellant finding himself, through his careless look-out, in an emergency in which he had to act quickly became flurried and lost his head, which may account for his not seeing the rickshaw with which he collided. The brake marks indicate that the car would have collided with the footpath and one of the side pillars of the bridge had there been no rickshaw to hit; though they do suggest that on striking the rickshaw the car's course was slightly deflected to the left.

No evidence was given as to whether the wheel marks indicated that any attempt was made to get the car on its right course. Had there been such an attempt I would have expected the marks to indicate it—perhaps by a latteral drag, though the momentum might have been too great for the attempt to succeed. I see no reason to think that it was impossible for appellant to swerve to his right immediately after he had swerved to his left, and this failure to swerve into his correct course and so save his car and passengers and himself from possible injury is a further indication that he lost control of himself.

I do not like to lay too much stress on these white lines in the absence of evidence to explain them, but I see nothing in them to suggest that there was any attempt to straighten the car on its course, another indication that the driver lost his presence of mind, though not to such an extent as to cause him to forget to apply his brakes.

Had this view of the evidence been suggested to the Magistrate, it is possible that he would have accepted it. If he had accepted it, would it have made any difference to his finding? I think it could have raised a doubt as to whether the appellant was reckless or just careless, and if it did raise that doubt the appellant should have had the benefit of that doubt.

The fact that that defence was not raised does not matter. If it could reasonably be supported by the evidence it must be considered: *R. v. Hopper*[8]; *Knowles v. The King*[9]; *R. v. Ong Choon*[10].

The real cause of the accident was appellant's carelessness in not keeping a sufficient sharp look-out as he approached the bridge. This fact created a situation which he was subsequently unable to control.

The case seems to me to be a border line case. Taking into consideration the fact that the accident occurred at a time when much traffic was not to be expected and that the accident may have been caused by the appellant losing his head rather than by recklessness, I think there is a doubt whether criminal negligence was established.

I therefore set aside the conviction under section 304A of the Penal Code and substitute a conviction for driving in a manner dangerous to the public, contrary to section 10 of the Traction Engines and Motor Cars Ordinance (Cap. 214), and I substitute a fine of $200 and in default of payment, two months simple imprisonment. I order the appellant to be disqualified for holding or obtaining a driver's licence for two years from the 23rd day of July.

Order Accordingly.